

1 UNITED STATES DISTRICT COURT.  
2 WESTERN DISTRICT OF NEW YORK  
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5 - - - - - X  
6 UNITED STATES OF AMERICA ) 08CR157A  
7 vs. )  
8 JAMES G. LITZ ) Buffalo, New York  
December 3, 2010  
2:16 p.m.  
9 Defendant.

10 - - - - - X  
11 **SENTENCE**

12  
13 TRANSCRIPT OF PROCEEDINGS  
14 BEFORE THE HONORABLE RICHARD J. ARCARA  
15 UNITED STATES DISTRICT JUDGE  
16  
17

18 AUDIO RECORDER: Jane D. Kellog  
19

20 TRANSCRIBER: Karen J. Bush, RPR  
21 (585) 613-4312  
22 100 State Street  
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23  
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A P P E A R A N C E S

WILLIAM J. HOCHUL, JR., ESQ.  
United States Attorney  
BY: TRINI ROSS, ESQ.  
Assistant United States Attorney  
138 Delaware Avenue  
Buffalo, New York 14202

Lipsitz, Green, Scime, Cambria, LLP  
BY: HERBERT GREENMAN, ESQ.  
42 Delaware Avenue, Suite 300  
Buffalo, New York 14202  
Appearing on behalf of defendant

ALSO PRESENT:       MICHAEL QUARANTILLO, USPO

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P R O C E E D I N G S

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THE CLERK: Criminal action 2008 157 A. United States versus James G. Litz; sentencing. Counsel, please state your name and the party you represent for the record.

MS. ROSS: Trini Ross for the United States, and Shaun Patel from the Department of Justice Civil Rights Division for the United States.

MR. GREENMAN: I'm sorry. Judge Herbert Greenman for Mr. Litz.

THE COURT: Are we ready?

MS ROSS: Yes, your Honor.

MR. GREENMAN: Yes.

THE COURT: The defendant stands before the Court for sentencing on his previous plea of guilty to one count of deprivation of civil rights violation of 18 U.S.C. Section 242. I know that counsel reviewed the report and, I assume, Mr. Greenman you reviewed it with your client?

MR. GREENMAN: I have, your Honor.

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2 THE COURT: The Court accepts the terms and  
3 conditions of the plea agreement and the plea of guilty to one  
4 count of deprivation of civil rights. I will now place the  
5 presentence investigation report in the record under seal. If  
6 an appeal is filed, counsel on appeal will be permitted access  
7 to the sealed report to the recommendation section. The  
8 parties have filed appropriate statements prior to sentencing  
9 regarding the sentencing factors. There is no dispute about  
10 the facts contained in the report and, therefore, the Court  
11 adopts these facts as its findings of fact and hereby  
12 incorporates them into the record. There is no objection to  
13 the probation officer's conclusions as to the applicable  
14 Guidelines. The report recommends that the base offense level  
15 under Guideline section 2H1.1(a)(3)(A) is 10. Report also  
16 recommends a six-level upward adjustment pursuant to  
17 2H1.1(b)(1)(A) and (B) as the defendant was a police captain at  
18 the time of the offense and used his position in the commission  
19 of the offense. The report recommends a three-level downward  
20 adjustment based on acceptance of responsibility and  
21 accordingly recommends the offense level should be properly  
22 calculated at 12. And the criminal history category should be  
23 properly calculated as category 1. Under this calculation, the  
24 advisory Guideline range for imprisonment is 12 to 18 months.  
25 As per Guideline Section 5C1.1(d), the applicable Guideline

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range in zone C of the sentencing table. The minimum term is satisfied by a term of imprisonment or a sentence of imprisonment that includes a term of supervised release or a condition that substitutes community confinement or home detention according to the schedule in subsection (e) provided that at least one half of the minimum term is served by imprisonment. Advisory range for supervised release is two to three years. Advisory range for a fine is from 3,000 to 32,000 plus the cost of imprisonment and supervised release. In accordance with the Supreme Court's decision in *United States vs. Booker* and the Second Circuit Court's decision in *USA vs. Crosby*, this Court must consider the Guidelines but is not bound by them. The Court must also consider the factors in 18 U.S.C. Section 3553(a). Now, I received a memorandum from Mr. Greenman, and I believe that the number of letters is somewhere around 67. I may have miscounted, but I also received a lot of other materials relating to the background and commendations and accomplishments of your client. Mr. Greenman.

MR. GREENMAN: Thank you, your Honor. Judge, may it please the Court. One of the few times maybe in my professional career I'm at a little bit of a loss for words and I won't be lengthy, your Honor. And, to tell you the truth, I'm sort of conflicted. I'm afraid I'm going say too much and then I'm afraid I'm going to say too little. So, for the first

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time in many years, I actually made some notes that I probably won't look at. Judge, I think the Court has a full handle as to what this case is about. What you have here is a decorated police officer of many years who basically crossed the line and let his own emotions affect him in a way that was impermissible. And shortly after he was notified of this investigation, he agreed to plead guilty. And he is here to be sentenced -- or six months later. And it's a horrible time, it really is. And I don't discount, Judge, you know, the meaning for this, for police officers in general. I'm sure the Court has read Mr. Litz's letter. He wrote it himself. It was all of his own words, how he feels. And he understands himself that he has disgraced himself because he acted in a way inappropriate when he was a police officer. And he also feels very strongly that he has disgraced the badge. And those are honest feelings that he has, Judge. A man who was devoted and loved what he did. And I suggested at one point in time to Mr. Litz, he may disagree with me, that I just sort of felt that maybe, as I look back in retrospect maybe with 20/20 vision, I thought that he had stayed on perhaps too long. His health had begun to fail. He reacted in a way, obviously, here that was improper and the question is why it all happens. I don't think anybody can ever really know the real answer other than the fact that the victim of the crime is that he says he hopes some

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day to be able to meet with him and apologize in person. To the police officers with whom he served, he is sorry as well. And obviously to his wonderful family, beautiful wonderful family, who has suffered so much and has been so severely devastated by what he did. And I guess the question comes down to, Judge, what is the appropriate sentence. I know that is why you're there, Judge, and why I'm here. I am barred by the plea agreement to advocate for anything less than a sentence within the Guideline range and I won't. I do note that and I very seldom even talk about the Guideline ranges when I talk about sentencing, I think you know that, Judge, the number of times I appeared before you because I do believe, and as I sat here before watching the sentence before me, I firmly believe that you're in the best position, better than me because of my feelings towards my client and better than anybody to objectively impose an appropriate sentence. The lowest end of the Guidelines here is according to a zone C sentence where you're able to consider a split sentence. Obviously I ask the Court to sentence him as low within the Guidelines within the range set as the Court would be able to consider.

Judge, James Litz, I actually never met him. We have had a case maybe against him some years ago, I believe a client out in the city of Tonawanda. I never really knew him. Came to know him earlier this year. Came to know his wife,

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Cindy, who, at the time, was the chief of police in the city of Tonawanda Police Department, and his two beautiful children. And we have talked many times. Many times we've had conversations of nothing as it related to this case, but just talking of things in general. And, you know, Mr. Litz stands ready before you, Judge, for whatever punishment or whatever sentence you believe is appropriate. I would be remiss, your Honor, if I didn't mention what has happened to him over the last couple of months. And I say what's happened to him, his health and medical condition. Because I think it's important. And whether stress was an inducement to some of the issues that he faces today, I don't think we'll ever know. But he was in relatively modest health when he came before you six months ago. He was never really a robust man, he is thin, gaunt a little bit, and I began to find out things about his medical condition that he found difficult to talk about and I think as to all the reports and as we're getting them in and what is happening, things were happening so quickly, I ended up presenting to the Court three or four separate medical reports because his condition was worsening. What wound up happening here, Judge, so the Court can put it in perspective, is shortly after he pled guilty, his body started to shut down a bit and as the Court knows, his bladder has shut down and the doctor feels it may be irreversible, we don't know yet. To the point



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where he had to be catheterized. I know this is all embarrassing to a man who once stood proud behind the badge. And not too long ago, he fell and began a series of falls at home. He broke his ribs on his left side and then he fell again and broke his ribs on the right side. And he didn't have the courage to tell me about it. But, in the past week, he fell again, and looks like he broke another rib. And the question was, really, what is going on with him. And, of course, the Court notes in the past week or two he has been diagnosed with multiple sclerosis, which is a degenerative disease and is now progressing. And it's an illness that he had over the last couple of years that was detected, but because he didn't show symptoms, they didn't do any of the work with respect to what they now find with the lesions on his brain and the fact that they're extended. And I say all of this, Judge, I know it sounds maybe emotional and maybe the Court may feel maybe this really doesn't have anything to do with what he did with respect to his crime of conviction, but, you know, Judge, he is just right now stands before you, hates to say it, but he is a defeated man, a sad man trying to cope with all of these issues. And I can't imagine. He is coping with the potential of going to jail, he is coping with the felony conviction. He immediately walked off his job and retired. And now he faces all of this and at a time in his

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1 life where most people are trying to find his happiness, he is  
2 confronting more situations as he goes on. Through it all,  
3 through it all, he has never made an excuse. He has never said  
4 to anybody, you know that I deserve forgiveness for what I did.  
5 He is still the same person that he was before who says -- who  
6 will stand up before you today, Judge, I suspect, I don't know  
7 what he is going to say, I think what he is probably going to  
8 say is that whatever happens is my fault and I accept whatever  
9 you do. Takes a special person, I guess, to be in that  
10 position and not to feel sorry for himself because he refuses  
11 to feel sorry for himself. I know he is working hard at his  
12 illnesses and trying to cope. His family is trying to cope and  
13 this has all been devastating. But I think the bottom line,  
14 Judge, is with all of the documents and reports and  
15 commendations, and what the pre-sentence report that was  
16 submitted, I think you have a pretty good picture of the person  
17 that he is. And I thought to myself, Judge, as I was walking  
18 over here, it's hard as an attorney to come before a court  
19 because he committed a serious crime. And he was a police  
20 officer when he did it. And as I indicated to the Court, he  
21 crossed over. He went further than what he should have gone  
22 and did something he never should have done. And I thought to  
23 myself as well that, you know, it's easy in life that when a  
24 person does something that he shouldn't do, when he falls from  
25

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2 grace, and his has been a pretty tough fall, Judge, it tends to  
3 be easier to maybe not remember all of the good things that the  
4 person has done in his life and he has done a lot of good  
5 things. I know the Court won't forget. I don't expect you're  
6 going to forgive him for what he did because there is no  
7 forgiveness and there are no excuses, there just is basically  
8 the time that he stands before you and ready to be sentenced.  
9 I don't know what else I can say about him, Judge, other than  
10 what I said in the papers. You're right about the letters.  
11 There may be more letters than I've ever submitted before and  
12 all of the good things that were said about him and, frankly,  
13 the heroic things he's done in his life, he never talks about.

14 THE COURT: He never what?

15 MR. GREENMAN: He never talks about them. He  
16 never talks about them. He is, Judge, what he did to the  
17 police officer, to the victim and to his family, that is what  
18 he is today. That is the sad thing, but I think he is a better  
19 person than just that and we ask the Court to sentence him  
20 accordingly. Thank you very much.

21 THE COURT: Mr. Litz, this is your opportunity,  
22 sir, to say anything you want to say.

23 THE DEFENDANT: Sorry, Judge?

24 THE COURT: This is your opportunity to say  
25 anything you would like to say.

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2 THE DEFENDANT: Well, I looked up the word  
3 remorse. I have a good understanding of what it was. And it  
4 talks about a yearning feeling of guilt for past actions and  
5 wrongs and there is another definition -- painful. None of  
6 those are strong enough. This is life altering for me. I gave  
7 32 years to try and improve other police officers, including  
8 myself, and ultimately I couldn't live up to my own standard  
9 when it involved me. So, I thought, well, all the teaching I  
10 did went to waste and blew up. But maybe it will help put a  
11 period under the message that I taught that I failed. If I can  
12 fail, better be careful you don't. Because you don't wake up  
13 in the morning and say, oh, I'm going to abuse this guy or I'm  
14 going choke this guy for spitting on me, you don't do that.  
15 And I always thought perception is reality and when it deals  
16 with your own family in an off-duty encounter, be a good  
17 witness. Train yourself to be a good witness. Don't get  
18 involved because we're human and we succumb to emotions like  
19 everybody else and I didn't live up to my own standard. This  
20 is why I stand before you today in terms of apology. I could  
21 take all your time. You got the justice department, they  
22 didn't relish this and the officers that are uncomfortable at  
23 best for whatever the reason I'm here today and it's me. I'm  
24 here because I didn't live up to my own standards. Nobody else  
25 put me here, but it wasn't pleasant for everybody. I worked so

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2 hard for 32 years to raise that and I failed. I failed myself.

3 THE COURT: Ms. Ross.

4 MS. ROSS: Your Honor, pursuant to the plea  
5 agreement, the government would ask for a Guideline sentence  
6 and we're not opposed to a sentence at the lowest end of that  
7 Guideline range.

8 THE COURT: You know, this was -- I spent two days  
9 on this. And I read every one of those letters and I've been  
10 in this business a long time. I was in this business as a  
11 prosecutor, as a U.S. attorney, as a district attorney and now  
12 as a judge. I always thought when I became a judge, sentencing  
13 people would be one of the easiest parts of the job. I said  
14 this is what I do. I'm going to lock everybody up as much as I  
15 can. That is what I did for 20 something years. And I went --  
16 at the time of the plea in this case, I thought I had in front  
17 of me one of the worst cops I ever encountered because in the  
18 plea agreement there are statements about other incidents. To  
19 this date, I can't figure out what the government wants me to  
20 do with those statements, but other incidents, which have, as  
21 far as I know, there is nothing in my record to support any of  
22 them. You admit to them, but you also say that your client did  
23 nothing wrongful, which means not illegal and not improper. So  
24 what do I have? All this information which apparently the  
25 media has had a field day with. Making all these claims about

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all these different things and then I read all these letters and read all these commendations, and I said, my God, this man is not this rogue cop that I thought I was being presented with. I didn't quite understand, and to this day I don't understand, why there was a delay of two years to the time of the indictment to the time it was unsealed. I guess because there was other cases under investigation. I never seen anything like that in my entire career. That is a long time where they would be held back. I note that even when you try to make a request for an adjournment to have the sentencing put off until after November when there was a change in the Guideline range, the government opposed it because of the victim, would be unfair to the victim. Yet, the government waited two years before they unsealed the indictment, which I thought was very hypocritical of the government to hold back for two years the indictment and then use that as an excuse to deny or take a position to deny your request for adjournment for two or three months. I just never have seen anything like this in my life.

I looked at the letters, I read the letters and they were some of the most difficult letters I ever read. Here is a man, except for this incident, which he has taken the blame and he showed true remorse from the time it happened, an event that happened at 1 o'clock in the morning in his house

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when his daughter was apparently receiving threatening phone calls and all of a sudden there is activity in his yard and the victim apparently was arrested by two fellow police officers. He goes out there and in an emotional state, from what I can see, took out a little vengeance on that person. No question the victim was hurt. I don't believe he received any hospital treatment. I don't believe -- I never even received a letter from the victim. The only thing I have seen is some other incident that allegedly happened, which I have no proof that it did happen, about some lady driving her car into a car, smashing into a wall back and forth and allegedly a gun was pulled out. Well, I don't know what the circumstances were and also these other instances involving other individuals. I don't know why it's in the plea agreement, can't figure it out. It's not relevant conduct. There is no proof that I have in front of me other than to try and somehow or other, I guess, get the Court to use that information indirectly, I guess, to impose a higher sentence. To show that your client was an, I guess, a dishonorable cop. The fact that your client has saved people's lives 32 years, as far as I can see, a very distinguished career. These letters from -- he was considered to be the chief of police, he was one of three candidates as I understand the record, one of three candidates to be considered for chief of police for the city of Tonawanda. You don't get

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there unless you've done a lot of good things and have a lot of respect from a lot of people in law enforcement and these people are from neighbors, I've never seen such a cross section of letters in my life that show the character of this man who made a bad decision, maybe emotional, maybe because he was worried about his family, the shame that he has caused himself, I've never seen it before to this degree. The shame he caused, he resigned from his position, which apparently he loved. His wife resigned as chief of police because of the embarrassment. The poor children have suffered from all of this. You read this letter from the daughter, this letter, I read this letter three times. This letter had such an impact on me. These are real people here. And we're all talking about one incident in his own backyard at 1 o'clock in the morning. And you would think this police officer from reading some of the accounts that I have read that this was a very, very terrible police officer who is violating everyone's rights. Well, I don't see that in this record. And I take issue with a lot of things that have been said publically in the newspapers about this man's career and his wife's career. These people, as far as I can see, everything that I have in front of me and this is what we're dealing with here, we're dealing with the record, not what other people say outside, what other people want to say with no way to challenge anything, just put it in the paper



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2 that all these bad things happened. I'm not saying something  
3 may or may not, I don't have any proof that any of these things  
4 happened. I have them in the statement, in the plea agreement,  
5 but I don't know what I'm supposed to do with it. If I use it,  
6 he would be entitled to a hearing and to challenge these  
7 statements and you're denying those statements of any wrong  
8 doing.

9 MR. GREENMAN: That's correct.

10 THE COURT: Not only illegality, but any  
11 wrongdoing. That is different than any illegality. If the  
12 government thought it was so serious, the government could have  
13 brought the charges, but result of a plea agreement I guess it  
14 was resolved not to. Whether it could have been proven or not,  
15 I don't have any idea. But for me to be expected to use those  
16 in some way to put a harsher sentence. I want you to answer me  
17 one thing. You're saying here right now that this man deserves  
18 to go to prison. You tell me why.

19 MS. ROSS: Your Honor, the government asks for a  
20 Guideline sentence.

21 THE COURT: Yes, a term of imprisonment. You give  
22 me one justification why you feel in this case this gentleman,  
23 based on this record, his career, what he has done for this  
24 community, why this man should go to prison.

25 MS. ROSS: Because, Judge, we're talking about the

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2 one count indictment of which he pled guilty to.

3 THE COURT: How is the public going to be served  
4 by this man serving one day in jail?

5 MS. ROSS: Judge, we're asking for justice for the  
6 victim in this case.

7 THE COURT: Oh, I agree with that.

8 MS. ROSS: And the victim was inside of a police  
9 car in handcuffs had been arrested by the other officers of the  
10 police department when the defendant came out. It wasn't that  
11 the victim --

12 THE COURT: It was his own home at 1 o'clock in  
13 the morning.

14 MS. ROSS: I understand, Judge, but the victim in  
15 this case had already been arrested, had already been placed in  
16 handcuffs, was in the back of a police vehicle where the  
17 defendant had to come out, open the door before he could attack  
18 the victim. When he asked the fellow officers do you need  
19 assistance, they said, no, we have it under control, we've  
20 already arrested the perpetrators. And there was two of them.  
21 One was in one police vehicle and the other was in another  
22 police vehicle. He picked and chose, he didn't know.

23 THE COURT: He resigned, he has a felony  
24 conviction. The shame that this man has brought upon himself,  
25 his family, the police department, what more do you want? How

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2 much do you want out of his rock? What do you see as justice  
3 here?

4 MS ROSS: The government is asking for a Guideline  
5 sentence.

6 THE COURT: You're asking for a term of  
7 imprisonment. Let's talk in English, okay? You're asking for  
8 a term of imprisonment. Explain to me why the system, the  
9 Guidelines, think that justice is served by this man serving  
10 one day in prison.

11 MS. ROSS: Judge, as you told Mr. Henry here  
12 earlier, because Congress has deemed it that way, because the  
13 Sentencing Commission --

14 THE COURT: The advisory Guideline, the law is not  
15 black and white. The law is not a computer. The law is gray.  
16 The law has to look at all of the facts and circumstances. Do  
17 you want me to just take all of this information, which you  
18 have not challenged any of it, take all of this information and  
19 just throw it away, 32 years of this man's career and just  
20 throw it away? That is what you're asking so he can go to  
21 jail?

22 MS. ROSS: No, that is not what the government is  
23 asking.

24 THE COURT: The government is asking for a term of  
25 imprisonment. I want you to explain to me why a term of

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2 imprisonment is justified under these circumstances based on  
3 this record.

4 MS. ROSS: And I think I've tried to, your Honor,  
5 because in this particular situation, in the charge that the  
6 defendant has pled guilty to, it's not exactly as perhaps Mr.  
7 Greenman wants us to see, it's not that the victim was outside.

8 THE COURT: I understand that.

9 Ms. ROSS: Looking in windows.

10 THE COURT: The man made an error. He made a bad  
11 judgment. He was obviously, he wasn't in uniform. He was on  
12 his own property. There is someone there, his daughter is  
13 getting threats, I guess that is what I understand, no one has  
14 contested that. All of a sudden this person is on his property  
15 in custody and he reacts to it. Now, you think that is  
16 irrational for a father to react that way?

17 MS ROSS: I think it's irrational for someone in  
18 law enforcement who is a seasoned police officer to open up the  
19 door of a police cruiser where a perpetrator has been placed in  
20 handcuffs under arrest and go in and choke him.

21 THE COURT: I understand that. I understand that  
22 he choked him for 30 second.

23 MS. ROSS: A man in handcuffs.

24 THE COURT: It was a very terrible thing the  
25 victim received.

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2 MS. ROSS: That is why the government is asking  
3 for a Guideline sentence.

4 THE COURT: You're asking for a term of  
5 imprisonment. I want you to justify for me why you feel a term  
6 of imprisonment is appropriate in this case, how the ends of  
7 justice are being served.

8 MS. ROSS: Judge, we would ask you to look at the  
9 3553(a) factors.

10 THE COURT: That is what I'm looking at. What do  
11 you think I'm talking about?

12 MS. ROSS: You're also talking about the way the  
13 plea agreement was drafted and I understand that we talked  
14 about this at the time of the plea, it was an unusual plea  
15 agreement.

16 THE COURT: I haven't seen anything like this in  
17 almost 40 years of experience in my career.

18 MS. ROSS: I understand.

19 THE COURT: I don't understand it.

20 MS. ROSS: I understand, Judge.

21 THE COURT: The government's job is to prosecute,  
22 but to see that justice is done. That is your role.

23 MS. ROSS: That is my understanding and that is  
24 exactly what I think the government is doing by asking for a  
25 Guideline sentence. We have a victim.

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2 THE COURT: Now, I'm going to ask you again, and  
3 if you don't answer it this time, I'll assume you don't have an  
4 answer or a justification for it. Explain for me why you feel  
5 a Guideline sentence of imprisonment is appropriate in this  
6 case.

7 MS ROSS: Judge, as you know, sentencing goes to  
8 many things. There are specific deterrents and general  
9 deterrents. You're talking specific deterrents about this  
10 individual. The government looks at these cases as a whole.

11 THE COURT: You show me one other case that has  
12 ever happened in western New York with facts that even remotely  
13 relative to this. Most of the time police officers are acting  
14 under color of law, which he did here because he opened the  
15 door, that is what I guess the color of law is here.

16 MS. ROSS: That's correct.

17 THE COURT: He is a father at his own property at  
18 1 o'clock in the morning with two people just been arrested for  
19 trespassing.

20 MS. ROSS: Judge, he is a police officer. He  
21 knows better than an average citizen the boundaries of the law.

22 THE COURT: Do you hear sometimes, maybe sometimes  
23 emotions get the best of you when it involves your family.

24 MS. ROSS: Judge, I don't disagree with that. You  
25 asked me a question, I'm trying to explain the government's

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2 position. We have a police officer who felt that he could go  
3 to the car, open the door and choke a perpetrator who was  
4 already under arrest and in handcuffs as the government's  
5 position here is to protect society, protecting society.

6 THE COURT: This is protecting society, one  
7 isolated incident.

8 MS ROSS: If we're talking about.

9 THE COURT: And incidents. I have no information  
10 at all other than newspaper accounts and what's in the plea  
11 agreement that these other incidents even happened. I'm not  
12 saying they didn't happen, I don't know anything that I can use  
13 that I can say I'm going to give him -- I'm going to put him in  
14 prison for 10 years because apparently this police officer does  
15 all these things all the time because he has done it in the  
16 past.

17 MS. ROSS: That is not what the government is  
18 asking. Ten years would be a statutory maximum sentence.

19 THE COURT: I understand that.

20 MS. ROSS: And the government is asking for a  
21 Guideline sentence. The government is not opposed to a low end  
22 of a Guideline sentence.

23 THE COURT: And what would be a minimum?

24 MS. ROSS: 12 months. And he could get a split  
25 sentence as Mr. Greenman asked for, why he asked for the

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2 adjournment.

3 THE COURT: How is justice being served by that?

4 MS. ROSS: Judge, we have a victim in this case  
5 and justice is being served.

6 THE COURT: I understand that.

7 MS. ROSS: Because Congress and the Sentencing  
8 Commission thought for these set of facts.

9 THE COURT: Advisory Guidelines, the Supreme Court  
10 made it clear these aren't mandatory.

11 MS. ROSS: Then, Judge, you can sentence the  
12 defendant, obviously, as you're stating, however you feel is  
13 just. The government's position is that we agree with the  
14 factors that the Sentencing Commission took into consideration  
15 when they came up with the Guidelines.

16 THE COURT: You think the Sentencing Commission  
17 considered all these factors, a man of 32 years of  
18 distinguished work who has given so much of his life to this  
19 community who has saved people out of harm's way.

20 MS. ROSS: I don't think the Sentencing Commission  
21 could take into account every particular defendant.

22 THE COURT: That is why I'm a judge, and that is  
23 why it's no longer mandatory. We have to use common sense and  
24 good judgment when the court is imposing a sentence and not  
25 look at these things as black and white. They're not black and



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2 white. The Guidelines are not black and white. They're  
3 certainly something the Court has to carefully consider and I'm  
4 considering them.

5 MS. ROSS: And that is all the government is  
6 asking you to do.

7 THE COURT: No, you're asking for a Guideline  
8 sentence.

9 MS. ROSS: We're requesting a Guideline sentence.  
10 We understand.

11 THE COURT: Have you ever asked for a sentence  
12 other than the Guideline sentence?

13 MS. ROSS: I have, your Honor. I absolutely have.

14 THE COURT: You have?

15 MS. ROSS: In my sixteen years as a prosecutor, I  
16 surely have.

17 THE COURT: Mr. Greenman, do you ever recall the  
18 government asking for a sentence outside or below the Guideline  
19 range?

20 MR. GREENMAN: It's unfortunate, it's never  
21 happened to me.

22 THE COURT: A 5K. I don't remember one time.

23 MS. ROSS: I absolutely have.

24 THE COURT: And that is what the Supreme Court was  
25 concerned about with the fact that when the Guidelines were

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2 mandatory that they took away this thing called human element  
3 in sentencing. And this is a human element in sentencing. And  
4 that is compassion, leniency, there is mercy and there is also  
5 deterrence and all the other factors the Court has to consider  
6 and evaluate his case. I cannot see how justice is served by  
7 this man serving one day in jail.

8 MS. ROSS: Judge, the sentencing obviously is up  
9 to you. And so --

10 THE COURT: I appreciate you saying that.

11 MS. ROSS: And no, Judge, I understand your  
12 position. I'm trying to explain to you the government's  
13 position. We understand that this Court will use its wisdom,  
14 as Mr. Brown said, to make the appropriate sentence as the  
15 Court deems appropriate, we understand that. But the  
16 government has -- you asked the government's position, that is  
17 the government's position. You asked the reasons why, I tried  
18 to articulate to the Court why.

19 THE COURT: Mr. Greenman could not argue for a  
20 sentence lower than the Guideline sentence.

21 MS. ROSS: I'm sorry?

22 THE COURT: Mr. Greenman could not argue for a  
23 lower sentence than the Guidelines then.

24 MS. ROSS: He could not argue for it, but I think  
25 he got his point across very well.

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2 THE COURT: Well, I don't know whether he got his  
3 point across. Let me just say this, again, at the time of the  
4 plea, I thought Mr. Litz was probably one of the worst cops  
5 I've ever been exposed to. I've been dealing with police  
6 officers my entire career. I was in the military police many,  
7 many years ago and I know one thing that is very important is  
8 that the public have trust and confidence in the police and  
9 what they do. Okay, it's the most important thing.

10 MS. ROSS: I completely agree.

11 THE COURT: And if you don't control the police  
12 officers, there is always that potential for abuse. They're  
13 out there in the street, they're enforcing the law, all kinds  
14 of things happen out there. We're in this wonderful courtroom,  
15 things are very deliberate, very thought through. When you're  
16 out there in the street, things happen. And it wasn't like a  
17 situation where he is out there. All the cases I've ever seen  
18 it's always a police officer acting as a police officer. He  
19 wasn't acting as a police officer at the time. Under color of  
20 law because he had two subordinates under him, but he was  
21 acting as an individual. He was acting in an emotional level  
22 because he was very upset. And guess what? In life we all  
23 from time to time handle situations where you say, you know, I  
24 really wish I had not done that. It was wrong. And in this  
25 situation, it's also illegal and he has admitted that. I mean,

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2 the shame this man has had on his family, the shame he has  
3 caused himself, this is not the same person that was out there  
4 as a law enforcement officer, as far as I can see, unless you  
5 dispute anything that has been submitted to me.

6 MS. ROSS: Judge, I don't.

7 THE COURT: These letters, everything in this  
8 file, I don't want anything under seal. I want everything  
9 public. This is the information that I'm using.

10 MS. ROSS: That's fine. Your Honor, one last  
11 point on your point. I understand what the Court is saying and  
12 I think I don't even believe that the government and the Court  
13 are that far in our view of this.

14 THE COURT: Really. I thought we were about 180  
15 degrees different.

16 MS. ROSS: I do not believe so based on the  
17 statements that you just made, based on what's happening out  
18 there, what happens to law enforcement officers. I prosecute  
19 civil rights cases, my son is a New York State trooper. I get  
20 it. I absolutely get it.

21 THE COURT: I prosecuted civil rights cases in my  
22 former life, both as a district attorney and as a United States  
23 Attorney.

24 MS. ROSS: And then you know there are cases that  
25 you prosecute and there are cases that you don't.

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2 THE COURT: Okay. But there has to be something  
3 called justice and justice is what's fair, what's right and  
4 that is not black and white. The Guidelines are advisory, the  
5 Guidelines are helping the Court determine what a fair sentence  
6 would be. But I didn't leave my common sense and my judgment  
7 and my life's experience in my Chambers when I came out here.

8 MS ROSS: Judge, I don't believe that I left mine,  
9 either. I believe when we looked at this case and looked at  
10 the different factors and obviously things that the government  
11 knows.

12 THE COURT: Here is the factors. It's 1 o'clock  
13 in the morning on his own property, there was a commotion  
14 outside of his property, apparently he sees lights out there,  
15 he grabs a flashlight and his wife is sleeping. I don't know  
16 whether he was sleeping or not. He hears the commotion. He  
17 goes out there. He sees this man in handcuffs in the car who  
18 they had just arrested who was a trespasser at the time and he  
19 lost it. And he admits that. He admits it. It's not that he  
20 ever one time said, you know, I'd do it again. He admitted it  
21 right from the very beginning that he exercised bad judgment.  
22 What more do you want from a human being? What more shame do  
23 you want to cause this man and his family. Prison? Is that  
24 what you think is fair here? Is that what you think is just  
25 and right? Did you read all these letters?

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2 MS. ROSS: Yes, your Honor, I did.

3 THE COURT: And didn't have any effect on you at  
4 all?

5 MS. ROSS: Judge, I know the circumstances of the  
6 case as presented to you in the plea agreement. I also know  
7 the circumstances of the other cases as presented.

8 THE COURT: The other cases? If you want to bring  
9 the other cases, bring them. Okay? Bring them. But don't use  
10 those other cases for me. The only reason you would be using  
11 them is for me to give a higher sentence.

12 MS. ROSS: We're not asking for a higher sentence.

13 THE COURT: Then why did you put the information  
14 in there anyway?

15 MS. ROSS: Well, Judge, for example, Mr.  
16 Greenman's memorandum, he said this is why this conduct  
17 happened of the case we're talking about in the indictment.

18 THE COURT: They deny any wrongdoing. Not only  
19 any illegality, they denied any wrongdoing, okay? They're  
20 denying there was anything wrong.

21 MS. ROSS: I understand.

22 THE COURT: And if you felt it was illegal, which  
23 is a higher than just being wrong, then you should have brought  
24 the charges.

25 MS. ROSS: I don't disagree, Judge.

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2 THE COURT: But you didn't do that, but you put  
3 this information out there for what reason. I still don't  
4 understand other than to prejudice this defendant and I'm not  
5 buying it.

6 MS ROSS: Well, Judge, I can assure you, we did  
7 not put it out there to prejudice the defendant. I wouldn't do  
8 that. I think I'm a better prosecutor than that.

9 THE COURT: Well, how is he supposed to defend  
10 himself with those things other than deny it? What else could  
11 he do?

12 MS ROSS: Judge, the defendant signed the plea  
13 agreement. He knew that information was in there. We didn't  
14 force him sign the plea agreement. He knew that information  
15 was in there and we can't --

16 THE COURT: And he denies any wrongdoing and you  
17 have produced no evidence to support what's in that plea  
18 agreement to this Court unless there is something here that I  
19 haven't seen and I've spent hours reading all of this material.

20 MS ROSS: Judge, under 3553(a).

21 THE COURT: You don't have to read 3553(a) to me.  
22 I read it all the time.

23 MS ROSS: You're asking why the information is in  
24 there and I think I stated this at the time of the plea when  
25 the Court asked the same question. This was information we

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2 had. We can't bring plea negotiations to the Court. Obviously  
3 that is prohibited by the rules. However, it's information  
4 that the government felt the Court should know about. Mr.  
5 Greenman is stating that the reason --

6 THE COURT: What do you want me to do with the  
7 information?

8 MS. ROSS: Just take it into consideration under  
9 the 3553(a) factors.

10 THE COURT: How would I consider that?

11 MS. ROSS: Well, Judge, that the reason the  
12 defendant committed the crime he did plead to was because he  
13 was emotional about what was happening to his daughter, but the  
14 point of the other -- those other incidents.

15 THE COURT: Do you deny that?

16 MS. ROSS: Excuse me?

17 THE COURT: Do you have any information to  
18 challenge that?

19 MS. ROSS: I don't have any information to  
20 challenge that. We just have the information that the  
21 government has. We have a victim that was already arrested in  
22 the car, handcuffed, the defendant came out, opened the door  
23 and choked him and I find that egregious.

24 THE COURT: It's outrageous. I agree with you.  
25 He admits it. How much do you want for him?



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2 MS ROSS: Well, that is why I said I don't believe  
3 the government and the Court are that far apart. Because we  
4 all agree that is egregious conduct. If the defendant was  
5 standing outside and the defendant didn't know him and he ran  
6 up to him, I wouldn't find that as egregious as a person who  
7 has already been placed under arrest, placed in handcuffs in  
8 the back of a police car with the door closed when the patrol  
9 officers say we don't need assistance, we've got it under  
10 control.

11 THE COURT: He wasn't trying to assist the police  
12 officers, he was operating under a sense of anger.

13 MS. ROSS: But police officers we hold to a higher  
14 standard in our society and that is how the government  
15 operates. This is why we brought the case. We understand  
16 people are emotional. He is a police officer. He has been in  
17 situations. We expect more.

18 THE COURT: He is also a human being with certain  
19 deficiencies, as we all are. Nobody is perfect in this world.  
20 I'm not even close to being perfect. And I try as hard as I  
21 can. And I make more errors, probably, than anybody else  
22 trying to make all the decisions I have to make. This thing  
23 happened in a split second, this happened -- well, it happened  
24 in about 30 seconds.

25 MS. ROSS: Judge, to open up the door of a police

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2 car and choke somebody that is already handcuffed and under  
3 arrest is what the government finds egregious and we ask for a  
4 Guideline sentence.

5 THE COURT: Well, I guess you and I are on a  
6 different wavelength, because I like to think that based on my  
7 experience that I could look at these things and see what they  
8 are and this is a very unfortunate situation, no question about  
9 it.

10 MS. ROSS: I would agree.

11 THE COURT: But how much more do you want? How  
12 much more do you want to take out of a person? Pursuant to the  
13 Sentencing Reform Act of 1984, it's the judgment of the Court  
14 that the defendant is hereby sentenced to a period of probation  
15 for a period of two years. While on probation, he shall not  
16 commit another federal, state or local crime. Shall be  
17 prohibited from possessing a firearm, ammunition or other  
18 dangerous device. In addition, he shall not possess a  
19 controlled substance. Shall comply with the standard  
20 conditions adopted by the Court and the following additional  
21 conditions. Since the instant offense occurred after September  
22 13th, 1994 is related to illegal substances and the defendant  
23 has no history of illegal substances, the mandatory requirement  
24 for drug testing is waived. The Court will impose a fine of  
25 \$10,000 on the defendant. Interest on the fine is waived and

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2 shall be paid within 60 days. He shall pay to the United  
3 States also the additional mandatory fee of \$100, that is due  
4 immediately. Payments shall begin -- well --

5 MR. GREENMAN: It will be paid by the beginning of  
6 next week.

7 THE COURT: And put it to some kind of finality.

8 MR. GREENMAN: We'll have it paid by the beginning  
9 of next week.

10 THE COURT: In determining the sentence, the Court  
11 has -- these are the reasons for the sentence. In determining  
12 the sentence, the Court has considered the advisory Guideline  
13 range and all points raised by defendant as well as the  
14 government as to what the appropriate sentence should be  
15 including the advisory Guideline range. In addition, I've  
16 carefully -- and I want to repeat -- carefully considered the  
17 factors in 18 U.S.C. Section 3553(a), I find the sentence  
18 imposed is sufficient but not greater than necessary to comply  
19 with the purposes of sentencing as set forth in 18 U.S.C.  
20 3553(a). I have imposed a non-Guideline sentence of probation.  
21 The offense involved a 2003 incident where the defendant, while  
22 off duty, choked an individual who was arrested for trespassing  
23 in his yard at his personal residence at approximately 1  
24 o'clock in the morning. In most cases involving police  
25 officers assaulting individuals being arrested, a sentence of

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incarceration would be imposed as a deterrent to other police officers who engage in this type of conduct. I am particularly concerned that someone of the defendant's experience and training should have known better than to act in the manner of which he did. Even if this incident involved his personal residence and even if it involved allegations of threats towards his daughter had been receiving anonymously, it certainly would not nonetheless be appropriate for him to act in the way he did and I believe he realizes that. The defendant's background indicates that he spent 32 years of distinguished service to the city of Tonawanda police department reaching the rank of captain. During these 32 years, he has made numerous extraordinary efforts for the community that he served, including successfully rescuing people from house fires, the advancement of community programs to combat driving while intoxicated and domestic violence. At one point in his career, he was a finalist for chief of police, which, of what, three finalists, which goes to, you don't become a finalist unless your background and your whole professionalism was under strict review. Obviously that is worth something the Court can consider here. The government has submitted no evidence of any disciplinary action taken against this defendant in the 32 years he was in the police force. The decision by the suspects to hide from the police in

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1 the defendant's yard at approximately 1 a.m. in the morning  
2 appears to be a mere coincidence. No question he was off duty  
3 at the time and may have -- well, not diminishing how grossly  
4 disproportionate his response was to the situation, I find the  
5 situation was more likely an extreme response by a homeowner  
6 than an intentional or planned effort to exploit his status as  
7 a police officer. I find the support for this view from the  
8 anguish he has caused his family, his wife's decision to retire  
9 from her position as chief of police, and the shame he has  
10 caused his whole family, as well as the police officers. It's  
11 certainly something that is not typical of most cases that I  
12 have. At this point, I note that the only reliable evidence  
13 that the government has chosen to bring to my attention  
14 suggests this incident was an isolated incident that would be  
15 consistent with the distinguished career of Mr. Litz and lack  
16 of any disciplinary history. It's also consistent with the  
17 extraordinary numbers of letters that I have received from  
18 chiefs of police, community leaders, neighbors and friends.  
19 The government has insisted on suggesting in the plea agreement  
20 other alleged incidents involving -- that should effect the  
21 sentence, I guess, the Court should give today. I have denied  
22 that information of other instances. I've chosen -- the  
23 government has chosen neither to prosecute those incidents or  
24 bring forth any evidence supporting them. Given the  
25

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government's decision not to submit any credible evidence supporting those incidents, I cannot go along with the implication by the government or the news media this is a case involving a rogue cop. I also will find that probation will sufficely deal with this. The defendant is presently in a very poor state of health and that appears to be worsening. And with respect to the background, Mr. Greenman has submitted medical background that has not been contested. He is at complete loss of hearing in one ear, that is he seeking treatment for diabetes, high blood pressure, high cholesterol, urological issues, and also it appears to me from the record here he sustained two back injuries during the course of his career. He has sustained severe nerve damage to his right foot. He has had two heart attacks. He has a tumor in his neck that has affected his motor nerves and has caused impartial use of his left arm. I further note that the incident in question occurred in 2003. That doesn't in any way at all diminish the seriousness of it, but I also note that there is a diagnosis recently of some brain lesions that strongly suggest a case of multiple sclerosis. Mr. Greenman has also submitted to me information that he also has a number of broken ribs. Reviewing the circumstances in totality, I do not again wish to minimize the conduct, but I see no indication that the defendant is a danger to the community in the present

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2 condition that the public needs to be protected from any  
3 further crimes by the defendant. A term of probation will be  
4 an appropriate sentence to reflect the seriousness of the  
5 offense, I believe to promote respect for the law, to provide a  
6 just and adequate sentence.

7 I also want to do something that I've only done  
8 very rarely. I want to read something to you. This is the  
9 recommendation section of the probation officer, who is not an  
10 advocate, who has looked at all of the facts in the case. The  
11 government has chosen to -- this is, I'll let you look at the  
12 whole recommendation, which I don't normally do, but there is  
13 one paragraph in here that I'm going to read and I don't think  
14 I've ever done this before: The government has chosen to  
15 include three other instances where it's alleged that the  
16 defendant used excessive force while on duty. One of these  
17 incidents occurred in 2005, and the other two occurred in 2009.  
18 The government has not charged the defendant in any of these  
19 incidents and the defendant has not admitted to any of them.  
20 As a result, this officer has not considered these allegations  
21 at all in formulating this recommendation. This defendant  
22 served as a city of Tonawanda Police Department from 1978 until  
23 his retirement in 2010. It is clear that this ordeal has  
24 caused great anguish to the defendant's family to the point  
25 where the defendant's wife has retired from the chief of police

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2 of Tonawanda to be with her family. The defendant is in very  
3 poor health, which appears to be worsening, and is taking  
4 medication for anxiety. Most recently an MRI scan indicated  
5 the defendant is most likely suffering from multiple sclerosis.  
6 In most cases involving police officers assaulting individuals  
7 being arrested, a sentence of incarceration would be  
8 recommended in order to deter law enforcement officers from  
9 engaging in this type of conduct. However, considering the  
10 serious, extremely serious nature of the defendant's health,  
11 this officer does not believe a sentence of incarceration would  
12 be appropriate. As a result, it is the officer's belief that a  
13 sentence of probation with a significant fine is adequate.

14 Now, that is from the probation office, which I  
15 think is very consistent with the sentence I imposed. You have  
16 the right to appeal this sentence if you feel the Court  
17 misapprehended its authority or imposed an illegal sentence.  
18 However, you did waive your right to appeal. If you feel that  
19 waiver is not a valid waiver, you may take that issue to the  
20 Second Circuit Court of Appeals. Anything further?

21 MS. ROSS: Nothing to dismiss.

22 THE COURT: Mr. Greenman.

23 MR. GREENMAN: No, thank you very much, your  
24 Honor.

25 THE COURT: The Court will be in recess.



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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from  
the official electronic sound recording of the proceedings in  
the above-entitled matter.

S/ Karen J. Bush, RPR

Official Court Reporter